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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: December 1, 2020

SUBJECT: Rules of the Air Quality Control Commission, Department of Public Health and Environment, concerning Stationary Source Permitting and Air Pollutant Emission Notice Requirements, 5 CCR 1001-5 (LLS Docket No. 200109; SOS Tracking No. 2019-00545)¹

Summary of Problem Identified and Recommendation

Section 25-7-114.1 (1), C.R.S., prohibits a person from emitting air pollutants from, or even constructing, a source without first filing an air pollutant emission notice (APEN) with the Division of Administration (Division) in the Department of Public Health and Environment. But the Air Quality Control Commission (AQCC) Rules II.A.1. and II.A.2.a. allow owners or operators of oil and gas well production facilities to file an APEN 90 days after commencement of operations. **Because the rules conflict with the statute, we recommend that Rules II.A.1. and II.A.2.a. of the rules of the Air Quality Control Commission concerning Stationary Source Permitting and Air Pollutant Emission Notice Requirements not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2021, unless the General Assembly acts by bill to postpone such expiration.

Analysis

1. **The statute requires an APEN to be filed before commencing operation unless the source of the air pollution is a residential structure or is of minor significance.**

The air quality control statute generally prohibits a person from emitting air pollutants from, or even constructing, an emissions source unless the person has **already** filed an APEN with the Division:

25-7-114.1. Air pollutant emission notices - rules. (1) No person shall permit emission of air pollutants from, or construction or alteration of, any facility, process, or activity **except residential structures** from which air pollutants are, or are to be, emitted unless and until an air pollutant emission notice **has been filed** with the division with respect to such emission. An air pollutant emission notice shall be valid for a period of five years. **(Emphasis added)**

Another statute requires the AQCC to promulgate rules to implement the APEN requirement:

25-7-105. Duties of commission - rules - legislative declaration - definitions. (12) **The commission shall promulgate such rules** and regulations **as are necessary to implement** the provisions of **the emission notice** and construction permit **programs** and the minimum elements of a permit program provided in Title V of the federal act. **(Emphasis added)**

Although the AQCC has "maximum flexibility" in developing an effective air quality control program pursuant to section 25-7-106 (1), C.R.S., including the promulgation of rules as may be necessary or desirable to carry out that program, the only explicit statutory exemption from the requirement to file an APEN **before** emitting air pollutants from or constructing an emissions source (other than the one for residential structures specified in section 25-7-114.1 (1), C.R.S., cited above) is for sources of "minor significance":

25-7-114.1. Air pollutant emission notices - rules. (2) **The commission shall exempt** those sources or categories of sources which it determines to be **of minor significance** from the requirement that an air pollutant emission notice be filed. **(Emphasis added)**

In fact, the two exemptions set forth in section 25-7-114.1 (1) and (2), C.R.S., are complete exemptions from the requirement to file an APEN. There is **no** statutory authority for the AQCC to promulgate a rule that allows any source that is required to

file an APEN to **defer** filing the APEN until some period **after** it has constructed an emissions source or begun emitting air pollutants.

2. The rules allow oil and gas well production facilities, which are neither residential structures nor of minor significance, to file an APEN 90 days after commencement of operation.

Pursuant to these statutory requirements, Rule II.A.1 specifies that "stationary sources" have to file an APEN **before** allowing emission of air pollutants from or constructing the stationary source:

II.A.1. Except as specifically provided in Section II.A.2, below, or as exempted in Section II.D., no person shall allow emission of air pollutants from, or construction, modification or alteration of, any facility, process, or activity which constitutes a stationary source, except residential structures, from which air pollutants are, or are to be, emitted unless and until an Air Pollutant Emission Notice and the associated Air Pollutant Emission Notice fee has [sic] been filed with the Division with respect to such emission. . . .

But Rule II.A.2. provides an extended APEN filing deadline for oil and gas well production facilities. These facilities have 90 days following "commencement of operation" to file an APEN:

II.A.2. The following requirements apply to oil and gas well production facilities
II.A.2.a. **Owners or operators of well production facilities** for which commencement of operation occurs after January 1, 2020, **must file Air Pollutant Emissions Notice(s)** for all emission sources with reportable emissions **no later than ninety (90) days following the commencement of operation**, using the current Air Pollution Emission Notice forms. **(Emphasis added)**

The rules directly conflict with section 25-7-114.1, C.R.S.

Oil and gas well production facilities are manifestly not residential structures covered by the statutory APEN exemption in section 25-7-114.1 (1), C.R.S. Nor are they sources of minor significance exempted by section 25-7-114.1 (2), C.R.S., as shown by the fact that they are not listed in rule II.D., "Exemptions for Air Pollutant Emission Notice Requirements," which states, in relevant part:

II.D. Exemptions from Air Pollutant Emission Notice Requirements

II.D.1. . . . The following sources are exempt from the requirement to file Air Pollutant Emission Notices because by themselves, or cumulatively as a category, they are deemed to have a negligible impact on air quality.

[The rule goes on to list numerous emissions such as fireplaces used for recreational purposes, safety flares, battery recharging areas, and aerosol can usage that are deemed negligible.]

There is no statutory authority for the 90-day extended deadline provided in the rules, and the extended deadline conflicts with the requirement in section 25-7-114.1 (1), C.R.S., to file an APEN **before** emitting air pollutants from, or even constructing, a nonresidential facility, process, or activity from which air pollutants are, or are to be, emitted. Because Rule II.A.2.a. creates this filing deferral, and Rule II.A.1. references Rule II.A.2.a., the rules conflict with statute and should not be extended.

Recommendation

We therefore recommend that Rules II.A.1. and II.A.2.a. of the rules of the Air Quality Control Commission concerning Stationary Source Permitting and Air Pollutant Emission Notice Requirements not be extended because the rules conflict with statute.